In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1154

JACKIE LONGFELLOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on two counts charging him with possession and interstate transportation of a tractor and 1456 cases of beer stolen from an interstate shipment, knowing the same to have been stolen (18 U.S.C. 659, 2314). He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence established that a tractor-trailer rig with 1456 cases of beer was stolen in Huntington, West Virginia during the night of June 14-15, 1967. The beer was taken to Ohio and then returned to Wheeling, West Virginia, where it was subsequently recovered. Several days later the stolen tractor-trailer was found burning near Weston, West Virginia. Petitioner was linked to these events by evidence that a tractor-trailer rig came onto a lot in Kanawha, West Virginia, of which petitioner was the manager, at 3:00 a.m. on the day of the theft; that petitioner was overheard stating in a telephone conversation just prior to the fire that "there will be a fire 150 or 200 miles from here;" and that red paint samples removed from the burning tractor were identical with paint from the paint shop at petitioner's business premises.[1]

The sole question presented by petitioner in this Court concerns the propriety, under *Michelson* v. *United States*, 335 U.S. 469, of the prosecutor's cross-examination of two character witnesses for the defense.

At trial, the defense called as a witness a Mr. Metheny, who had done business with petitioner for thirteen years. He testified on direct examination that petitioner's general reputation for honesty, veracity and being law-abiding was good (4a-6a).[2] On cross-exam-

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[1] The tractor-trailer was colored blue when stolen and apparently repainted in petitioner's garage to disguise its identity.

[2] References are to the joint appendix of the parties in the court below, containing excerpts from the proceedings at trial. A copy of this appendix is on file with the Clerk of this Court.

ination the prosecutor asked Mr. Metheny whether he had "heard that the defendant * * * is married" and whether he had "heard that [the defendant] was obtaining shipments from Chemical Leaman Tank Lines by conspiring with the dispatcher, Okey Edens, to falsify bills of lading from Union Carbide" (6a). Defense counsel's objections were overruled and the witness gave negative answers. A colloquy between the court and counsel then occurred outside the presence of the jury concerning the permissible scope of cross-examination of character witnesses. The judge announced that he would follow this Court's opinion in *Michelson* and when the jury returned, he gave an instruction patterned after the one approved in *Michelson* (335 U.S. at 472-473, fn. 3), to the effect that the cross-examination then being conducted was solely for the purpose of testing the witness' opinion as to the reputation of the defendant and that the jury should not assume that the incidents asked about actually took place (13a, set forth at Pet. 9-10). Thereafter the prosecutor asked Mr. Metheny the series of questions set forth at page three of the Petition and in each instance received a negative response from the witness. The same questions were later asked of a Mr. Vealey, who also testified to petitioner's good reputation (16a-17a). He also testified that he was unaware of any of the incidents alluded to by the prosecutor (17a-18a).

During a colloquy, the prosecutor offered to produce witnesses who would testify to the existence of the incidents which formed the basis for his questions, and defense counsel thereafter conceded that the ques-

tions were based on existing rumors and were not mere speculation or fabrication (12a, 22a-23a).

In his charge to the jury, the judge repeated the substance of the instruction he had previously given with regard to the limited purpose of the cross-examination of the character witnesses (23a-24a, set forth at Pet. 10).

Petitioner's principal contention is that the rule announced in *Michelson* should be abandoned and that no cross-examination of character witnesses should be permitted as to specific incidents in the defendant's past (Pet. 4-7). As the Court in *Michelson* recognized, the law on use of character evidence and the manner in which it may be challenged "has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court" 335 U.S. at 486. Intervening experience has not supplied any reason to reexamine that conclusion. There is nothing inherently unfair in facing a defendant with the choice of either refraining from attempting to convince the jury that he is of such good character that it is unlikely that he would engage in the criminal conduct charged, or placing his character at issue and allowing the government to ask the character witness whether they have heard of existing facts about his life which, if known, should adversely reflect on his reputation.[3]

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[3] Petitioner's alternative contention (Pet. 7-13) that the instant case is distinguishable from *Michelson* is without basis. The questions asked were relevant to test the witnesses' knowledge of petitioner's reputation and, as the court of appeals noted, "the district judge sufficiently followed the approved *Michelson* charge (Pet. App. A 17).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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